No. 10,110

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT EARL HOPPER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona.

BRIEF FOR APPELLANT.

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ABSTRACT OR STATEMENT OF THE CASE.

The evidence, construed as it must be, most favorably to the Government's case, shows: Robert Earl Hopper, Jr., the defendant herein, registered under Selective Service Act of 1940, being Title 50, U. S. C. Ch. 301, 311, on October 17, 1940. He was thereafter classified as I-A by the local board; however he subsequently requested a conscientious objector questionnaire and upon completion of that instrument was classified IV-E by his Board and was thereafter ordered to report for work of National Importance under Civilian Direction.

Upon receipt of the aforementioned order the defendant called upon the Selective Service Board at Prescott, Arizona (defendant lives on a farm some sixty miles from Prescott in an inaccessible cattle ranching country or community), and advised them that he had never received a notice of his classification of IV-E and then informed the Board or its Secretary that he had been erroneously classified and that he was one of Jehovah's witnesses and a Minister of the Truth, and as such he was commissioned to "preach this Gospel of The Kingdom in all the world for a Witness", and as such Minister he was entitled to the classification of Ordained Minister of Religion or, IV-D. He then made application for such classification of IV-D and the Local Board held a hearing upon this matter. (T. R. 73—Govt's Exhibit No. 14.) The Local Board never did dispose of this application and never did act upon the evidence adduced at the hearing held pursuant to such application.

The Defendant did refuse to report to any Conscientious-objector camp pending disposition of his application and any appeal to which he was entitled. (R. T. 107, lines 10-14.)

The Defendant-Appellant was subsequently arrested and this appeal follows conviction upon the charge as laid in the Indictment. (T. R. 1.)

The Appellant will present for the consideration of the Honorable Court the following propositions:

The Indictment in the instant case is fatally defective for the reasons:

(1) That said Indictment does not charge that said defendant was lawfully required by any duly constituted agency of this Government to any specific thing enjoined by the act in question, and/or that he failed and refused to do and perform any act lawfully required of said defendant under said statute, Wherefore the Indictment must fail.

(2) That the Statute (Title 50, U. S. C. Secs. 301, 311) as construed and applied is unconstitutional and void because said Statute attempts to deprive defendant of his liberty and property without due process of Law in contravention of the Fifth Amendment to the United States Constitution; that said statute attempts to subject defendant to involuntary servitude not as a punishment for crime in violation of the Thirteenth Amendment to The United States Constitution; and that said Statute attempts to delegate Governmental and Legislative powers to private individuals and non-governmental agencies.

That the Honorable trial Court erred in the admission of certain evidence;

That the Honorable trial Court erred in denying defendant's motion for a directed verdict made at the close of the Government's case, and renewed at the close of all of the evidence in the case (T. R. 10-12) which was made upon the grounds:

(1) That the Indictment is fatally defective.

(2) That the Statute upon which this action is based is unconstitutional and void because:

(a) It violates the First Amendment to The United States Constitution in that it places a penalty on religion and prohibits the free exercise of religion.

(b) It violates the Fifth Amendment to The United States Constitution in that upon its face and as construed and applied said statute deprives defendant of liberty and property without due process of law; in this that said statute attempts to delegate legislative powers and administrative powers to private individuals and private non-governmental agencies.

(c) Said Statute, as construed and applied violates the Thirteenth Amendment to The Constitution of The United States in that it subjects the defendant to involuntary servitude not as punishment for crime.

(d) That no public offense has been proved against this defendant; in this: that from all of the evidence introduced by the Government the only permissible conclusion that any impartial tribunal could have arrived at is that the Local Selective Service Board had acted arbitrarily and capriciously in classifying defendant IV-E and that such classification was void and said evidence conclusively shows that the only possible classification of defendant was IV-D.

ASSIGNMENTS OF ERROR.

No. I.

The Indictment is fatally defective because:

(a) It does not state facts sufficient to constitute a crime or public offense.

Harris v. U. S., 104 Fed. (2d) 41;
U. S. v. Britton, 107 U. S. 655;
U. S. v. Cruikshank, 92 U. S. 542;
Pettibone v. U. S., 148 U. S. 197;
Kane v. U. S., 120 Fed. (2d) 990.

(b) The statute on its face and as construed and applied is unconstitutional and void, because:

(1) It deprives defendant of his liberty and property without due process of law;

(2) It attempts to subject defendant to involuntary servitude not as punishment for crime;

(3) It attempts to delegate legislative power to private, non-governmental agencies.

(4) It restrains and prohibits the free exercise of religion.

Carter v. Carter Coal Co., 298 U. S. 238;
Rome v. Marsh, 272 Fed. 982;
Wong Wing v. U. S., 163 U. S. 228;
Bailey v. Alabama, 219 U. S. 219;
In re Brooks, 5 Fed. (2d) 238;
Ex parte Wilson, 114 U. S. 417;
Ex parte Lloyd, 13 Fed. Supp. 1005.

Nos. II to XI, incl.

These assignments raise identical questions and will, in the interests of brevity, be presented together.

The Honorable Court erred in the admission of evidence being documentary in its nature and alleged to have been signed by the defendant. No foundation was ever laid for its reception other than that it was a part of Selective Service Board Records. Certain of these exhibits purport to be signed by the defendant yet his signature was never identified nor was any proof offered that these instruments were his acts.

No. XII.

The Honorable Court erred in denying defendant's motion for a directed verdict of not guilty made at the close of the Government's case and renewed at the close of the case (T. R. 10-12), which motion was made upon the grounds:

(1) That the Indictment is fatally defective.

(2) That the Statute is unconstitutional and void because:

(a) It violates the First Amendment to The United States Constitution in that it places a penalty on religion and prohibits the free exercise of religion.

(b) It violates the Fifth Amendment to The United States Constitution in that upon its face and as construed and applied said statute deprives defendant of liberty and property without due process of law; in this, that said statute attempts to delegate legislative powers and administrative powers to private individuals and private non-governmental agencies.

(c) Said Statute, as construed and applied violates the Thirteenth Amendment to The Constitution

of The United States in that it subjects the defendant to involuntary servitude not as punishment for crime.

(d) That no public offense has been proved against this defendant; in this: that from all of the evidence introduced by the Government the only permissible conclusion that any impartial tribunal could have arrived at is that the Local Selective Service Board had acted arbitrarily and capriciously in classifying defendant IV-E and that such classification was void and said evidence conclusively shows that the only possible classification of defendant was IV-D.

ARGUMENT.

ASSIGNMENT OF ERROR No. I.

That on the 7th day of February, 1942, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the statute is unconstitutional and void in that it attempts to deprive defendant of his liberty without due process of law and attempts to subject defendant to involuntary servitude and attempts to delegate legislative authority to an executive officer, and that the Honorable Court erred in denying said motion to quash indictment, which order was rendered on the 17th day of February, 1942.

The Indictment (T. R. 1) sets forth, in part: "that Robert Earl Hopper, having theretofore registered under the Selective Training and Service Act of 1940, on or about (or about) the 22nd day of June A. D., 1941, * * * did knowingly, wilfully, unlawfully and feloniously fail and neglect to perform the duty required of him under and in the execution of said Act, and the rules and regulations made pursuant

thereto, that is to say, that the said defendant Robert Earl Hopper, having been theretofore classified by his local draft board at Prescott, Arizona, as a conscientious objector, and found fit for general service, did then and there, knowing, wilfully, unlawfully and feloniously fail and neglect to report as a conscientious objector for civilian work of national importance when notified so to do by his local draft board * * *".

The title of the administrative agency set up and established by The United States to deal with all questions arising under Selective Training and Service Act of 1940 is Yavapai County Local Board No. 1, Selective Service System. (R. T. 69, lines 11-41 —Testimony Harry F. Dise.) No other agency has ever been empowered to deal with Selectees in the first instance, that is to classify such Selectees and issue valid orders respecting them. Patently some agency denominated "his local draft board" as alleged in the Indictment (T. R. 1-2) can have no jurisdiction over defendant and can issue no valid order concerning him.

The allegations of an Indictment are jurisdictional; the sufficiency of the averments therein go to the very foundation of the right of a Court to entertain the cause or to subject the defendant to any further proceedings therein.

This Indictment does not allege that defendant was ever ordered to do anything lawfully required of him by any agency lawfully constituted to so order. The words "his local draft board" mean nothing. If it was intended to charge with failure to report

upon lawful order of Yavapai County Local Board No. 1, Selective Service System that fact should be so stated as it is the basis of proof of any violation of this section of the Statute. Certainly no inconvenience to the Government could result from being required to properly state the basis of the charge in the Indictment.

The Indictment is fatally defective in that it does not state when, where, or to whom defendant was to report. From the Indictment we cannot tell whether the defendant be required to report to the Selective Service Board, the nearest Forest Ranger, or the United States Commissioner, or some other Governmental Agency. As to when he was required to report under the alleged order we are left entirely to conjecture.

An Indictment must charge each and every element of an offense.

Pettibone v. U. S., 148 U. S. 197;
Kane v. U. S., 120 Fed. (2d) 990;
Harris v. U. S., 104 Fed. (2d) 41.

Every essential element of the crime has generally been required to be charged, not merely inferentially, but with reasonable certainty and directness.

Kane v. U. S., 120 Fed. (2d) 990;
U. S. v. Hess, 124 U. S. 438, 31 L. Ed. 516.

A well considered recent case upon the question here involved is the case of *Harris v. United States,* supra. This case holds, among other things, that:

> "The essential elements of a statutory offense must be set out in an Indictment".

> "Allegations of essential elements of statutory offense are matters of substance and not of form and their omission is not aided or cured by verdict".
>
> "The omission from an Indictment of any fact or circumstance necessary to constitute an offense will be fatal."
>
> "nor can any such omission be supplied by intendment or implication and the charge must be made directly and not inferentially or by way of recital."

and on the proposition that the allegations of an Indictment are Jurisdictional:

> "Where challenge to an Indictment is based upon an omission in averments thereof of an essential element of crime, objection thereto is not waived and may even be asserted on appeal for the first time."
>
> *Harris v. U. S.,* supra.

Also see:

U. S. v. Britton, 107 U. S. 655;
U. S. v. Cruikshank, 92 U. S. 542;
Pettibone v. U. S., 148 U. S. 197;
Kane v. U. S., 120 Fed. (2d) 990.

We feel that the statement of bare essentials made, sufficiently states Appellant's position with reference to the substantive allegations of the Indictment and demonstrates that the alleged Indictment is a nullity.

The argument and propositions of Law directed to the balance of Assignment of Error No. I, being that portion addressed to the Unconstitutionality of

the Law will be made under Assignment of Error No. XII having to do with the denial of the Motion for Directed Verdict. We respectfully seek the Court's indulgence that we may avoid repetition.

ASSIGNMENT OF ERROR No. II.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit No. I in evidence to which defendant excepted; said Government's Exhibit No. I in evidence being a registration card alleged to have been signed by defendant and which the witness Gerald T. Bigaouette testified that he was from October 17, 1940 until December 31, 1940 the chief clerk of the local Selective Service Board and that said (28) Exhibit I was a part of his records kept under the rules and regulations of the department, the basis of defendant's objection being that Government's Exhibit No. I was not properly identified, all as more fully appears on pages 11 and 12 of the Reporter's Transcript.

ASSIGNMENT OF ERROR No. III.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit 2 in evidence, to which exception was taken, which Government's Exhibit 2 in evidence is the classification record of the United States Government kept on each individual that is registered in the county or local board, which objection was made upon the grounds that said exhibit was in no way connected with defendant, that there is no foundation laid connecting it with the defendant, and that it has never been shown that the defendant has ever registered, as appears at pages 16 and 17, Reporter's Transcript.

ASSIGNMENT OF ERROR No. IV.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit 4 in evidence, which objection was made upon the grounds that said Exhibit 4 was not properly identified and that it was in no way connected with this defendant, said Exhibit 4 being conscientious objectors' report to which ruling the defendant excepted, as appears at page 25, Reporter's Transcript.

ASSIGNMENT OF ERROR No. V.

The Honorable Court erred in overruling defendant's objection to Government's Exhibit 5 in evidence, which is a report of physical examination, which objection was made upon the grounds that said exhibit was in no way connected with the defendant, to which ruling exception was taken by defendant, as appears at pages 28 and 29, Reporter's Transcript.

ASSIGNMENT OF ERROR No. VI.

That Honorable Court erred in overruling defendant's objection to Government's Exhibit VI in evidence, which said objection being made upon the grounds that it is in (29) no way connected with this defendant and no foundation has been laid and exception duly taken to the ruling of the Court, as appears at page 30, Reporter's Transcript.

ASSIGNMENT OF ERROR No. VII.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. VII in evidence, which objection was made upon the grounds that it was not identified and had no bearing upon this defendant; said Government's Exhibit No. VII being special form for conscientious objectors, and the defendant having excepted to the ruling of the Court admitting said exhibit, as appears at pages 33 and 34, Reporter's Transcript.

ASSIGNMENT OF ERROR No. VIII.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. VIII in evidence, being a letter as more fully appears in the bill of exceptions, addressed to the defendant, which objection was made upon the grounds that said letter was not shown to have any connection with this defendant and was not properly identified, to which ruling the defendant excepted, as appears at page 36, Reporter's Transcript.

ASSIGNMENT OF ERROR No. IX.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. IX in evidence, being letter dated December 23, 1940, addressed to the defendant, which objection was made upon the grounds and for the reason that said exhibit has no bearing on this defendant and is not properly identified, to which ruling defendant excepted, as appears at page 28, Reporter's Transcript.

ASSIGNMENT OF ERROR No. X.

That the Honorable Court erred in overruling defendant's objection to the receipt in evidence of Government's Exhibit No. III for identification, being Government's Exhibit III in evidence, which purports to be a selective service questionnaire signed by defendant, which was admitted upon the (30) testimony of Harry F. Dise, who testified that he had been the clerk of the Yavapai County Local Board, Selective Service System, from January 1, 1941 to the present date, and that he took over the records on January 1, 1941, that had formerly been in the custody of the witness Gerald T. Bigaoutte, and that said exhibit was in the file when said witness took over and that said exhibit was a part of the permanent records kept by his office, said exhibit being objected to by the defendant upon the grounds that it was not shown that the instrument was signed by the defendant and that it was not connected up with the defendant in this case, and that it was incompetent, to which ruling defendant excepted, as appears at pages 47 and 48, Reporter's Transcript.

ASSIGNMENT OF ERROR No. XI.

That the Honorable Court erred in receiving in evidence Government's Exhibit 2-B is the remainder of the classification record of the United States kept for each individual that is registered in the county of the local board, which objection was made upon the grounds that it was in no way connected with the defendant and that it was incompetent, to which ruling defendant excepted, as appears at page 51, Reporter's Transcript.

The foregoing assignments apply to admission of evidence and all present the same proposition. The basis of the right of the Local Board Selective Service System is the act of registration and completing questionnaire and filing same with the Board. The act of registration as evidenced by Government's Exhibit One, Assignment of Error II was if made by defendant made in the presence of some officer who could testify to its authenticity, the same is true of the questionnaire Government's Exhibit III in evidence, Assignment of Error X which is required to be sworn

to and purports to have been sworn to before one Jessie Stephens, Postmaster at Camp Verde, Arizona. To admit this evidence on no authentication other than the fact that these instruments are part of the records of the Selective Service Board and to sustain such rulings is to open the door to a very dangerous practice in the admission of evidence.

ASSIGNMENT OF ERROR No. XII.

That the Honorable Court erred in denying defendant's motion for directed verdict of not guilty, which said motion was made on the 27th day of March, 1942, after the plaintiff had rested and which said motion was made upon the grounds: That the indictment is totally defective and does not charge a public offense or crime; that the statute, Sections 301 to 311, inclusive, of Title 50, United States Code, is unconstitutional and void in that it violates the First Amendment of the Constitution of the United States in that it places a penalty on religion and prohibits the free exercise of religion, in that said statute violates the Fifth Amendment to the United States Constitution in that upon its face and as construed and applied said statute deprives defendant of his liberty and (31) property without due process of law and that said act on its face and as construed and applied violates the Thirteenth Amendment to the Constitution of the United States in that it subjects defendant to involuntary servitude not as punishment for crime and upon the further ground that said statute attempts unlawfully to delegate legislative power to private non-governmental agencies, or to private individuals, and upon the further ground that said statute delegates judicial power to sentence for an unlimited term of involuntary servitude without opportunity to be heard, to a non-judicial tribunal, and upon the further ground that no public offense has been proved nor has any crime been proved against this defendant, to which ruling the defendant duly excepted, as appears at pages 82 to 86, inclusive, Reporter's Transcript.

(1) The argument addressed to the sufficiency of the Indictment is contained herein under Assignment of Error No. I and will not be repeated here.

(2) (a) The Statute places a penalty on religion and prohibits the free exercise of religion. As construed and applied by the Selective Service Board and the trial Court because the defendant has religious scruples he must be placed under the jurisdiction of Religionists who will direct his activities; he must be removed from the place of his ministry and go to a place directed by persons who are not governmental officers. He must practice his ministry under the supervision of persons having violently divergent views as to the Ministry.

(b) It violates the Fifth Amendment to The United States Constitution in that upon its face and as construed and applied said statute deprives defendant of liberty and property without due process of law; in this, that said statute attempts to delegate legislative powers and administrative powers to private individuals, and private non-governmental agencies.

The Statute does not contemplate the induction of the defendant into the armed forces of the United States. Nor is the Statute or those portions of it relating to conscientious objectors and their service drawn under the Constitutional power of Congress to raise armies. In fact the act provides that conscientious objectors who are found fit for general service shall be assigned to work of national importance "under civilian direction". The rules and regulations promulgated under the authority of the Statute provide:

> "The National Service Board for religious objectors, *a voluntary unincorporated association,*

> shall have complete charge and be responsible for the management of the camps to which conscientious objectors are assigned, and that said association shall defray all expenses with reference to such camp."

This regulation appears at page 2001 Federal Register for 1941, and was promulgated April 11, 1941, by the Director of Selective Service. Here we find the attempted delegation of authority to private individuals so vigorously and properly proscribed by the decision in *Carter v. Carter Coal Company,* 298 U. S. 238, 80 L. Ed. 1163, wherein the learned Justice condemned this delegation in the following language:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is Legislative delegation in its most obnoxious form; for it is not even delegation to an official or official body, presumptively disinterested but to private persons whose interests may be and often are adverse to the interests of others in the same business.
>
> "In the very nature of things one person may not be intrusted with the power to regulate the business of another and a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary and so clearly a denial of the rights safeguarded by the due process clause of the Fifth Amendment that it is unnecessary to do more than refer to decisions of this Court which foreclose the question. A. L. A. Schechter Poultry Corp. v. U. S. 295 U. S. 537; Eubank v. Richmond 226 U. S. 137, 143; Washington v. Roberge 278 U. S. 116."

(c) Said Statute, as construed and applied violates the Thirteenth Amendment to The Constitution of the United States in that it subjects defendant to involuntary servitude not as punishment for crime.

When the acts or omissions with which defendant is charged were done the United States of America was at peace with the nations of the World. No war powers had been invoked and even had this country been at war it has been held by The United States Supreme Court that certain amendments are not suspended in time of war.

By the Thirteenth Amendment slavery of whatever name and form and all its badges and incidents was abolished. One person could not be held to render service to another against his will. One human being cannot under our Constitution, be required to render service to another whether that person be the Government or any individual excepting penal servitude as a punishment for crime. The Statute which attempts to require Defendant to perform work "of National importance under civilian direction" is an attempt to require "involuntary servitude" and to create a class of persons required to render service against their will and for an unlimited time because of their religious principles.

We adopt as our argument the following language from *Bailey v. Alabama,* 219 U. S. 219:

> "The language of the 13th Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest territory, and gave them unrestricted application within the United States and all

places subject to their jurisdiction. While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag.

"The words 'involuntary servitude' have a 'larger meaning than slavery'.

"The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."

"And in this explicit and comprehensive enactment Act, March 2, 1867, Congress was not concerned with mere names or manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained or enforced.

"It is the compulsion of the service that the statute inhibits, for when that occurs, the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness."

A recent decision upon this proposition is *Petition of Brooks,* 5 Fed. (2d) 238, wherein the right to hold a person is laid down and limited. We quote from that decision:

"The right to arrest and hold or imprison an alien is nothing but a necessary incident of the

right to exclude or deport. *There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for crime.* Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for crime. Citing Bilokumsky v. Tod, 239 U. S. 149, 154; 44 S. Ct. 54; 68 L. Ed. 221, and numerous authorities."

(d) That no public offense has been proved against this defendant; in this: that from all of the evidence introduced by the Government the only permissible conclusion that any impartial tribunal could have arrived at is that the Local Selective Service Board had acted arbitrarily and capriciously in classifying defendant IV-E and that such classification was void and said evidence conclusively shows that the only possible classification of defendant was IV-D.

When the Defendant made and filed his questionnaire Government's Exhibit III (T. R. 86-107), he stated therein (T. R. 99) "I am not a minister of religion—I do not customarily serve as a minister—I have been a minister of the Truth for Jehovah's Witnesses since October 39—I have been formally ordained. If so, my ordination was performed on ..... by God at ....." and again (T. R. 104), "I am one of Jehovah's Witnesses and as such I am entirely neutral to the affairs of this world, based on the booklet Neutrality". Further the stand of defendant is fully explained to his local board in Government's Exhibit 7. (T. R. 60.)

At the time defendant made and filed his questionnaire he could not say that he was a Minister of Religion because of the biblical admonition against religion. Defendant is a Minister within the fullest meaning of the term but he must follow the teachings of the Holy Bible and shun religion. He must be a true follower of Jesus Christ and preach the Truth as set forth in the Holy Bible.

> "And for all their works they do for to be seen of men. For they make their phylacteries broad, and enlarge their fringes.
>
> "And they love the first places at feasts, and the first chairs in the synagogues,
>
> "And salutations in the market place, and to be called by men, Rabbi,
>
> "But be not you called Rabbi. For one is your master; and all you are brethren.
>
> "And call none your Father upon earth; for one is your father, who is in heaven.
>
> "Neither be ye called masters; for one is your master, Christ.
>
> "He that is the greatest among you shall be your servant.
>
> "And whosoever shall exalt himself shall be humbled; and he that shall humble himself shall be exalted.
>
> "But woe to you scribes and Pharisees, hypocrites; because you shut the kingdom of heaven against men, for you yourselves do not enter in; and those that are going in, you suffer not to enter.

> "Woe to you scribes and Pharisees, hypocrites; because you devour the houses of widows, praying long prayers. For this you shall receive the greater judgment."
>
> St. Matthew, Ch. 23, V. 5-15.

He does, however, fully state the nature of his ministry and the facts stated and not his conclusions are the relevant portion of the statements.

That Jehovah's witnesses are entitled to the classification of IV-D, Minister of Religion is made plain and any doubts concerning their status set at rest is evidenced by Vol. III, Opinion No. 14, National Headquarters Selective Service System, promulgated by Lewis B. Hershey, Deputy Director, June 12, 1941 construing Sec. 5 (d), Par. 360, S. S. R. We quote in part:

> "Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based on whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

The act provides that the Board upon investigation to determine the applicant's true classification shall take evidence and shall place the same in its file in

order that the legality of the board's action may be determined. All of the evidence received by the Board, and upon which, of necessity, they predicated their classification is before the Court. And from all of this evidence it will appear that the action of the Local Board was arbitrary and capricious and that the Court should have directed a verdict of not guilty.

The duty of administrative boards in these matters is stated in *Rome v. Marsh,* 272 Fed. 982:

> "Administrative boards are not simply courts hearing cases between party and party; it is their duty to see that the individual citizen receives his rights, as well as that the government receives its proper due."

also, *U. S. v. Baird,* 39 Fed. Supp. 388, 391:

> "These cases undoubtedly settle the question that the determination of the local boards are final unless the selectee's rights were invaded. It is not the province of this court to review the evidence before the local board but only to review the case record to determine whether or not there was sufficient evidence before the board to substantiate its findings."

and, *U. S. v. Baird,* 39 Fed. Supp. 411, 413:

> "The law appears to be settled that the action of local boards within the scope of their authority is final and not subject to judicial review *unless the board has acted contrary to law or has manifestly abused the discretion committed to them by statute.*"

And if the Court should disregard all else, the Government's evidence (Government's Exhibit XIV,

T. R. 73) conclusively shows that defendant was arrested, tried and sentenced while he had an application pending for change in classification; this is evidenced by the Local Board's own stenographic report of proceedings. (Ex. XIV.)

It follows that the Court should have directed the verdict and left the defendant where it found him subject under the Law to the further orders of his Local Board.

We respectfully submit that the Judgment of the District Court should be reversed.

Dated, Phoenix, Arizona,
August 12, 1942.

CHARLIE W. CLARK,
Attorney for Appellant.